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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JESUS VALDEZ, Plaintiff and Appellant, v. LENNOX HEARTH PRODUCTS, Defendant and Respondent.	B171364 (Los Angeles County Super. Ct. No. TC015506)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rose Hom, Judge. Reversed in part and affirmed in part.

Nicholas Weimer for Plaintiff and Appellant.

Gray & Associates, Nancy E. Gray, and Colin J. Gibson for Defendant and Respondent.

Appellant Jesus Valdez sued his former employer, respondent Lennox Hearth Products, bringing causes of action for wrongful termination based on disability, wrongful termination based on violation of public policy, breach of oral contract, and breach of the covenant of good faith and fair dealing.[1] Judgment was entered in respondent's favor after its motion for summary judgment or summary adjudication was granted. We reverse the judgment, although we find that summary adjudication was proper on three of the causes of action.

Trial Court Proceedings

Lennox Hearth manufactures fireplaces at a factory in Lynwood. Valdez, who was fired in March of 2001, had worked for Lennox Hearth or its predecessor since 1980. He had a variety of jobs, most of them union positions, the union being the International Brotherhood of Electrical Workers. In 1993, he was promoted to team leader of the second shift in the Frame Cell Department, a management position that took him outside the union.

At all relevant times, the collective bargaining agreement provided that if an employee promoted to a non-union position returned to the bargaining unit within one year, he or she was entitled to the former classification and current rate of pay without any loss of seniority, but if the return was after one year "the employee's bargaining unit security shall be terminated."

In his complaint, Valdez alleged that he was taken out of the union without his knowledge or consent, and that when he learned the facts, he confronted his supervisor, Ray Cano, who agreed that if Valdez's position was eliminated at any time he would be restored to the union with his seniority intact. Valdez also alleged that he became disabled just prior to March 6, 2001, due to heavy manual labor on the job. He alleged that he was terminated on March 6 because of his disability and because he had

[1] The second amended complaint also included a cause of action for personal injury, but it appears that the cause of action was no longer part of the case by summary judgment.

complained about safety conditions on the job, and that the reason Lennox Hearth gave for his termination, that it was part of a restructuring, was untrue. Valdez believed that other workers with less seniority should have been laid off instead. Lennox Hearth objected to much of the evidence proffered by appellant at summary judgment. The trial court sustained those objections and found for Lennox Hearth on all causes of action.

Discussion[2]

1. The discrimination causes of action[3]

It was undisputed that in 2001, much of the work performed at the Lynwood factory was sent to a factory in Tennessee and that the move necessitated a series of layoffs. Valdez was one of 37 union members and 4 team leaders who were laid off. He was offered the opportunity to return to a union position, but without seniority, pursuant to the collective bargaining agreement.

At summary judgment, Lennox Hearth's essential theory on the discrimination causes of action was that Valdez was fired not for any forbidden reason, but as part of the general layoff. It proffered evidence in support: Plant Manager Ray Cano, who participated in the layoff decisions, declared that years with the company and union

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[2] We apply the familiar rules of review: "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law. [Citations.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

[3] One of Lennox Hearth's arguments is that Valdez failed to exhaust his administrative remedies, in that his California right-to-sue letter was based on age and race claims. As Valdez argues, exhaustion is not required on non-statutory causes of action such as the ones in this case. (*Rojo v. Kliger* (1990) 52 Cal.3d 65.)

seniority were the principle factors in the firing decisions, and that appellant was laid off because he was a second shift team leader, and was not needed because there was no longer a second shift. He was not made a team leader on the day shift because there were no suitable vacant positions. The team leaders on the day shift had more seniority. The layoff decisions were made on the basis of production needs, and in no case was a decision made for any reason concerning a worker's disability, on-the-job injury, or complaints about safety issues.

Human Resources Manager Isabel Huibonhoa was also involved in the layoff decisions. In pertinent part, her declaration is the same as Cano's. Finally, Lennox proffered evidence that Alfred Neino, who was at one time Valdez's supervisor, was not involved in the layoff decision, and was not his supervisor at the time of the layoff.

With this evidence, Lennox articulated a legitimate, non-discriminatory explanation for its acts. It was thus appellant's burden to produce substantial responsive evidence demonstrating that the articulated reason was untrue or pretextual, or evidence that Lennox Hearth acted for a forbidden reason, such that a reasonable trier of fact could conclude Lennox Hearth engaged in prohibited conduct. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 477; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 155-156.)

On the issue of disability discrimination, Valdez proffered his own declaration to the effect that at some point in approximately 1999, he asked to see the doctor because of injury to his shoulder. His supervisor, Alfredo Neino, refused to send him to the doctor. Later, in 2000, he was allowed to go to the doctor, but Lennox Hearth ignored the doctor's "light duty and no lifting" note. He also declared that he suffered an on-the-job injury to his back in July of 2000, and was given work restrictions.

Valdez argues that the evidence shows that Lennox Hearth was aware of his limitations. It is true that there are disputed facts on that issue, but we see no basis for the next argument, that there is evidence that Lennox Hearth chose to terminate him due to his disabilities. "Where a former employee's suspicions of improper motives are primarily based on conjecture and speculation, he or she has not met the requisite burden

of proof of establishing a pretextual basis for dismissal." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 996 disapproved on other grounds in *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 317.) That is the case here. There is no evidentiary basis for the claim that Valdez's disabilities were the true reason for his layoff.

As to the retaliation claim, Valdez declared that after his promotion to team leader he attended safety meetings, and along with others, began to complain that increased production requirements were unsafe and that various problems with machines resulted in shoulder pain for employees. He declared that at one point, Neino threatened to fire him if he did not stop complaining.

Valdez argues that there was another witness to Neino's threat, Servero Gomez. He relies on Sergio Ochoa's declaration that in early 2003, at a meeting with counsel, Gomez indicated that "Neino told him that these people who were always complaining about safety were going to be terminated." However, Lennox Hearth's hearsay objection to that part of the declaration was sustained.

Valdez's next factual argument, that other workers who complained about safety were terminated, also depends on Ochoa's declaration. On this point, Ochoa declared that he believed that he was terminated because he complained about safety problems. He also made several other statements about Lennox Hearth's attitude toward safety and toward light duty instructions. Lennox Hearth's foundational and other objections to those parts of the declaration were sustained. There is thus no evidence that other workers were subjected to retaliatory termination.

Valdez also argues that Lennox Hearth's failure to follow its own seniority policies and its own oral promise is evidence that the layoff was retaliatory. We discuss the evidence on the oral promise later in this opinion. We cannot, however, see that breach of any oral promise is even circumstantial evidence of retaliation.

As to failure to follow seniority rules, Valdez cites his declaration to the effect that his job was given to someone with less seniority. Lennox Hearth objected to that statement on the ground that there was no showing that Valdez had personal knowledge

of such a fact. The objection was sustained. There was thus no evidence that Lennox Hearth failed to follow its own rules on seniority.

In sum, Valdez's evidence on retaliation is that he made complaints, that Neino threatened to fire him for making complaints, and that he was terminated. In light of the fact that Valdez produced no evidence to counter Lennox Hearth's evidence that Neino was not part of the layoff decision, we again find that he did not meet his burden of producing substantial responsive evidence demonstrating that Lennox Hearth's articulated reason for the layoff was pretextual.

2. The breach of contract cause of action

Here, Lennox Hearth proffered Ray Cano's declaration that he did not recall telling Valdez that if he was returned to the union job he could return with his seniority intact, and that he would never have made that statement. In response, Valdez proffered his own declaration that at the time of his 1993 promotion "I questioned whether I wanted the position because I was concerned about losing my seniority. I expressed my concern to my supervisor Alfredo Bermudez and he took me directly to Ray Cano . . . . At that meeting, Cano orally agreed that if I lost my 'team leader' position for any reason and at any time, I would be given my union job back with my seniority intact."[4]

There is thus a triable issue of fact on whether any promise was made. In the trial court, Lennox Hearth cited the rule that a contract must be interpreted in a way which makes it reasonable (*Stein v. Archibald* (1907) 151 Cal. 220, 223), then argued that under that rule, Valdez could only have been promised that he would retain seniority if he returned to the union position within a year, because any other promise would have

[4] Valdez also proffered Bermudez's deposition testimony to the effect, that when he promoted people from union to nonunion positions, he told them that they could always go back to the union with no loss of seniority. Lennox Hearth's objections to the evidence were sustained.

conflicted with the collective bargaining unit and thus been unreasonable. Lennox Hearth repeats the argument on appeal.

The argument fails. When read liberally (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 863), Valdez declared that Cano promised that Lennox Hearth would act in a way which was inconsistent with the collective bargaining agreement, granting benefits in excess of those provided by the agreement. We cannot, on summary judgment, avoid the existence of a factual dispute on the existence of this promise by resort to a device of contract interpretation. Further, even if, as Lennox Hearth suggests, the promise alleged violates the collective bargaining agreement, so that Lennox Hearth could not perform, that is not the end of the issue. Damages can sometimes be awarded for breach of promises made with no ability to perform.

On appeal, Lennox Hearth also argues that the claim is pre-empted by the Labor Management Relations Act, 29 USC § 185. Issues not raised in the trial court may not be raised for the first time on appeal. (*Sea & Sage Audubon Society, Inc. v. Planning Com*. (1983) 34 Cal.3d 412, 417.) This question must be addressed to the trial court.

3. Breach of the covenant of good faith

In this cause of action, Valdez's complaint makes no specific factual allegations, but instead alleges that Lennox Hearth breached "explicit promises set forth in the company's employment policies and those imposed by law," and did so in bad faith. In his brief on appeal (and most likely in the trial court; our copy of his opposition to the motion is incomplete) Valdez argued that Lennox Hearth violated the covenant by failing to follow its own seniority policies with regard to its termination and by refusing to allow him to see a doctor when he was injured on the job and refusing to give him light duty when light duty was ordered. He cited *Guz v. Bechtel National Inc., supra,* 24 Cal.4th 317*,* for the rule that an employer's policies and practices may become implied in fact terms of the employment contract.

At summary judgment, Lennox Hearth argued that Valdez could not establish that it had in bad faith had failed to follow its own employment policies, or that it had acted in

bad faith in any other way. It proffered the facts concerning Valdez's termination and his on-the-job injuries.

As we have seen, there is no evidence that Lennox Hearth failed to follow its seniority policies. Valdez proffered facts that showed at most that a promise was made and breached. He did not even show that Lennox Hearth received any special benefit by inducing him to accept the 1993 promotion (he presumably was paid more in the new position), or by breaching the promise.

On the medical care argument, Valdez disputed Lennox Hearth's proposed fact that the only injury he reported was a July 20, 2000 back injury. He contended that he had also reported a shoulder injury but that Lennox Hearth would not let him see the doctor for that injury. In support, he cited his own declaration that in 1999 he asked to see a doctor because of a shoulder injury, but Neino, his supervisor, refused to send him to the doctor. In his written discovery responses, included with Lennox Hearth's motion, Valdez said that the shoulder injury occurred between 1995 and 1996 and that with the help of an interpreter he (at an unspecified time) asked Cano for a medical pass, which request Cano denied. At his deposition, also supplied by Lennox Hearth, Valdez testified that he had pain between his shoulders from working with factory equipment, and that on July 4, 1999, when his supervisor demanded more production, he decided to talk to Cano. Cano was not in, so he talked to Neino and Huibonhoa, telling them that he was in pain and needed a pass to go the doctor.

For Lennox Hearth, Huibonhoa declared that when a worker was injured on the job, he or she was urged to go the facility which handled the company's work-related injuries. No permission was required.

As to the back injury, it was undisputed that Valdez was treated under worker's compensation, returned to work three days later with a lifting restriction, and was discharged from care with no restrictions on August 4, 2000. Valdez declared that the restrictions "were ignored." There is nothing in his responses to discovery which adds to that response.

We see nothing in these facts which could, if believed by a jury, establish a cause of action for bad faith. Valdez proffered evidence that on one occasion he sought permission to seek medical help for shoulder pain he had suffered for some time, and that some work restrictions were not honored. If by those acts, Lennox Hearth violated its employment policies, Valdez proffered evidence of breach of contract, but bad faith is not mere breach of contract.

Disposition

The judgment in favor of Lennox Hearth is reversed, but we deem the trial court to have granted summary adjudication on the causes of action for wrongful termination based on disability and wrongful termination based on violation of public policy, and for breach of the covenant of good faith and fair dealing, and affirm the ruling on summary judgment/summary adjudication in that respect. Each party shall bear its own costs of appeal.

ARMSTRONG, J.

We concur:

TURNER, P.J.

MOSK, J.